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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1497

ACUPUNCTURE CENTER OF WASHINGTON and YANN THERESA KAO, *Petitioners*

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, and LORENZO M. WHITE, ACTING DIRECTOR, OFFICE OF EMPLOYMENT SERVICE, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 15, 1976

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The petitioners Acupunture Center of Washington and Yann Theresa Kao respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 16, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the District of Columbia is reported at 364 F.Supp. 1038 (1973), and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 16, 1976. This petition for writ of certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Labor may deny an alien's application for labor certification pursuant to Section 212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(14), if he fails to determine whether "available" domestic workers were "able, willing, qualified" to perform the job which the alien seeks.

2. Whether the burden of proof shifts to the alien if the Secretary shows that a limited pool of domestic workers exists.

STATUTORY PROVISION INVOLVED

United States Code, Title 8:

§ *1182. Excludable aliens—General classes*

(*a*) (*14*) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . .

STATEMENT OF THE CASE

Petitioner Kao is an alien who was admitted to the United States as a non-immigrant visitor on January 1, 1970. Born in mainland China on December 10, 1941 Ms. Kao received a B.A. degree in English Literature and History in June, 1967 from Providence College, Taichung, Taiwan. Before she graduated from Providence College, Ms. Kao became a teaching assistant at the college, participating in general office and secretarial work and using her translating abilities in English and Chinese. This employment continued until December, 1969.

After she arrived in the United States, Ms. Kao attended Fort Hays Kansas State College, Hays, Kansas, receiving an M.A. degree in Business Administration in May, 1972.

After completing her degree, Ms. Kao began working for Acupuncture Center of New York as an interpreter in July, 1972, continuing in that role until December, 1972. In that month she began her present employment for petitioner Acupuncture Center of Washington, serving as an interpreter in English, Mandarin, Cantonese and Shanghai dialects.

As a preliminary step in seeking classification as an alien whose skill is needed because of a "shortage of employable and willing persons existing in the United States", Ms. Kao on January 22, 1973 filed the appropriate form, 7-50A, and Acupuncture Center, on her behalf, filed form 7-50B with The Regional Employment Office of the District of Columbia Manpower Administration; this was done to obtain the requisite labor certification under 8 U.S.C. § 1182(a)(14). In support of her application for certification, Ms. Kao submitted

evidence of her education and her proficiency in the English Language and her knowledge of the Chinese language and its various dialects. In its application Acupuncture Center stated that Ms. Kao would have to perform various administrative tasks for the Chinese acupuncture practitioners and, in addition, would act as an interpreter between American patients and Chinese practitioners. An additional duty was described as being responsible for all bookkeeping.

On February 15, 1973 the D.C. Manpower Administration denied labor certification because, in its words, "qualified resident Chinese interpreters were available to perform the required job duties" and because the job requirements "were too restrictive".

Petitioners requested reconsideration on February 21, 1973 in a letter to Lorenzo M. White, Director, Office of Employer and Technical Services, D.C. Manpower Administration. With this request for reconsideration, they included a letter from Charles Newmark, Director-Administrator, of the Acupuncture Center of Washington. In his letter, Mr. Newmark stated that Ms. Kao worked as an interpreter, "speaking fluent Chinese, English, Mandarin, Cantonese and Shanghai dialects." He noted that many applicants had been interviewed for interpreting positions but they could not speak the requisite number of dialects. And he added that "Not all the doctors at the Center speak the same dialect, and therefore for accurate translation between Chinese Doctor, American Doctor and patient, such fluency is a requisite." He further described the difficulty in hiring people proficient in the requisite Chinese dialects, attaching to his letter a translation of an ad that had been placed by the Center in a

Chinese newspaper. Finally, he observed that Ms. Kao had to be brought from New York to occupy the position due to the difficulty the Center had in getting qualified people.

On March 8, 1973, the reviewing officer, Lorenzo M. White, affirmed the denial of the certification. According to Mr. White, the certification was refused on February 15, 1973:

> ". . . because resident workers were available to perform the required job duties. Miss Won's application was also denied because the salary was below the minimum prevailing rate of $8,000 per year. Miss Kao's application was also disapproved because the job requirements were too restrictive. Since the items creating adverse effect have been amended on both applications, we can remove those factors as a basis for denial. However, based on information available to this office, we must conclude that sufficient resident workers remain available in the Washington Metropolitan Area to perform the job duties required. While we are familiar with acupuncture terminology and practice, this does not appear to be a necesary occupational consideration and only impedes effective recruitment of an otherwise qualified local worker."

In a later letter, dated March 20, 1973, Mr. White explained to Mr. Robert Pfeffer, Assistant Solicitor of Labor for Manpower, why the certification was denied. He noted that contact had been made with a Mr. Winston Tsai, legal counsellor to the D.C. Chinese Cultural Association and the Formosan Club of America, Incorporated. According to Mr. White, Mr. Tsai indicated that "in excess of fifteen of those available [apparently members of his association] possessed

knowledge of English and various Chinese dialects." Mr. Tsai also advised that he had two applicants available for immediate referral, who could speak the dialects required by the Center. However, no such referral was ever made.

In the same letter Mr. White also advised Mr. Pfeffer that "the Language Services Division of the Department of State (Mr. Fukuda) can refer two applicants with fluency in Mandarin Chinese but feels it would be difficult to locate interpreters with fluency in three dialects. . ."

On October 5, 1973, the District Court for the District of Columbia issued a decision holding that the Secretary of Labor abused his authority in failing to determine whether the available local workers were able, willing and qualified to perform the work at the Center. An appeal was taken by the Secretary of Labor and the Court of Appeals for the District of Columbia Circuit reversed the decision on January 16, 1976.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF SECTION 212(a)(14) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. § 1182 (a)(14).

To reverse the District Court the District of Columbia Circuit relied on *Pesikoff* v. *Secretary of Labor*.[1] In that case the Court decided that there is a presumption in Section 212(a)(14) of the Immigration and Nationality Act against aliens working in the

[1] 163 U.S.App.D.C. 197, 501 F.2d 757, *cert. denied* 419 U.S. 1038 (1974).

United States. This presumption, the Court held, allows the Secretary of Labor ". . .to survey the available labor market for a class of workers who, while possibly not meeting the prospective employer's personalized job description, do provide the employer with the potential for getting his job accomplished. . . ."[2] As the Court said in the present case:

> . . . To be sure, the administrative record does not fully demonstrate that a domestic worker (a) fluent in English and each of the three specified Chinese dialects and also (b) familiar with acupuncture terminology and practice, (c) was available and (d) was able and willing to accept employment by the Center; but *Pesikoff* holds that the foundation for the Secretary's decision need not be nearly so broad.[3]

In *Shuk Yee Chan* v. *Regional Manpower Administrator of the United States Department of Labor*, 521 F.2d 592 (7th Cir. 1975), the Circuit Court ruled that the Administrator abused his discretion when he based a decision to deny labor certification on information from the Illinois State Employment Service without any showing that persons listed as "available" were actually able, willing and qualified and available to perform the labor which formed the basis of alien's application for certification. As the Court stated it refused

> . . .to place our stamp of approval upon an administrative procedure which appears to have involved a perfunctory exercise of acquiescense in the statistical compilations of the state employment serv-

[2] 163 U.S.App.D.C. at 203, 501 F.2d at 763.

[3] Appendix, p. 16a.

> ice. Nor will we approve of such a procedure where, as here, the data upon which the RAM's decision rested amounted to nothing more than a conclusory finding by the Illinois State Employment Service without any showing that the persons listed as available for occupation of social worker *were actually "able, willing, qualified and available" to perform the labor which formed the basis of appellee's application for certification. Id.* at 595-596, emphasis supplied.

This case followed the holding of *First Girl, Inc.* v. *Regional Manpower Adm. of U.S.D. of L.*, 499 F.2d 122 (7th Cir. 1974).

In *Seo* v. *U.S. Department of Labor*, 523 F.2d 10 (9th Cir. 1975), the Circuit Court held that the Secretary of Labor abused his discretion in denying a plaintiff's hospital employer certification for an alien radiologic technologist where the California Department of Human Resources Development referred only two persons to the hospital as available for work and where the Secretary simply denied the application on the basis of a state agency listing which indicated that 9 to 10 persons were registered for the job of radiologic technologist. This ruling properly distinguished the case of *Pesikoff* v. *Secretary of Labor*, 163 U.S. App. D.C. 197, 501 F.2d 757 (D.C. Cir. 1974), which the Court in the instant proceeding relies on to deny petitioner Kao's application:

> Many courts have recently dealt with the Secretary's decision-making process in applications for labor employment certification. In almost every case, the court held that blind reliance on state agency employment listings is an abuse of discretion. For these listings to be an adequate factual basis for a finding that there are no "able, willing,

> qualified, and available" American workers, they must be creditable, reliable and pertinent.
>
> *Pesikoff* v. *Secretary of Labor, supra*, is the only case which appears to be contrary. There, the court held that Section 1182(a)(14), as amended in 1965, sets a presumption against admission of alien workers. The court then found that the general data supplied to the Secretary by the Texas Employment Commission was "sufficient evidence of a pool of potential workers to support certification denial. . . ." 501 F.2d at 764.
>
> Although we agree with the analysis of § 1182 (a)(14) in *Pesikoff*, the case is readily distinguishable on its facts. There, 100 to 180 American domestics were registered to perform the type of unskilled work for which certification was sought. Absent any impeaching evidence, the information gave the Secretary an adequate basis to find that there were many persons able and willing to perform this type of unskilled work. Here, only 8 to 10 persons were registered for a job which requires a great amount of skill and training. In addition, the HRD listing was impeached by the hospital's inability to find a qualified radiologic technologist through HRD or through advertisements. 523 F.2d at 13 (footnotes omitted).

The holdings in these two cases are in conflict with the decision of the District of Columbia Circuit. In the *Shuk Yee Chan case*, the Regional Manpower Administrator relied on data furnished by the Illinois State Employment Service that there were over fifty domestic social workers seeking work. As noted above, however, the Seventh Circuit found that there was no showing that those domestic workers actually were "able, willing, qualified and available" to do the job the alien desired. In the *Seo* case, the Secretary of Labor relied on a state agency's listing of eight to ten domes-

tic workers, and the Ninth Circuit found there was no basis for a finding that these were "able, willing, qualified and available" domestic workers for the job of radiologic technician.

In short, the burden stayed where the statute placed it—on the Government.

The District of Columbia Circuit Court, however, found that when a small pool of available American workers exists without a showing of ability, willingness and qualification the burden of proof shifts from the Secretary to the employer. The local employment agency listed four Chinese interpreters. A U.S. State Department agency identified two persons with knowledge of one Chinese dialect but indicated that the Acupuncture Center's three-dialect requirement would make it difficult to find a qualified interpreter. Winston Tsai's clubs may have had fifteen persons who were "available" but only two were described as "available for immediate referral." Moreover, there was no way to determine whether any one was counted more than once. From this data, the Court concluded:

> The Secretary was informed that a number of qualified Chinese interpreters generally proficient in one or two Chinese dialects were locally available. Among them was an individual available for immediate referral, who was fluent in each of the three dialects which the Center had specified. At least two others—one of whom was known to be also available—were fluent in two of the three dialects. The size of the pool fairly indicated that there could well have been more. Appendix at 16a-17a (footnotes omitted).

The available workers' "pool" that persuaded the Court appears to total only eight: four from the local

agency, two from the State Department and two from Winston Tsai. As noted above, the Court even admitted that this "pool" did not "fully demonstrate" that a domestic worker was "able, willing, qualified and available" to fulfill the Acupuncture Center's needs. Petitioners submit that the Court's application of the *Pesikoff* case was in error and runs directly counter to the decisions of the Seventh and Ninth Circuits because it will permit a very limited number of "available" workers to constitute, without more, a "pool" adequate to shift the burden of proof from the Secretary to the applicant.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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April 15, 1976

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1050

ACUPUNCTURE CENTER OF WASHINGTON
and YANN THERESA KAO

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, and
LORENZO M. WHITE, ACTING DIRECTOR, OFFICE OF
EMPLOYMENT SERVICE, *Appellants*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 635-73)

Argued December 5, 1974

Decided January 16, 1976

Richard I. Chaifetz, Attorney, Department of Justice, with whom *John L. Murphy*, Chief, Government Regulations Section, Criminal Division, Department of Justice, was on the brief, for appellants.

Arnold P. Lutzker, with whom *Daniel M. Redmond*, was on the brief, for appellees.

Before LUMBARD,* *Senior Circuit Judge* for the Second Circuit, and MCGOWAN and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

ROBINSON, *Circuit Judge:* This controversy stems from decisions of the Secretary of Labor [1] declining to certify the existance of conditions set by Section 212(a)(14) of the Immigration and Nationality Act,[2] which would enable appellee Yann Theresa Kao to remain in the United States as an alien performing labor for appellee Acupuncture Center of Washington. In their suit for declaratory relief, the District Court entered a summary judgment remanding the case for further administrative proceedings,[3] and the Secretary now appeals. We find, upon scrutiny of the administrative record,[4] that our decision in *Pesikoff* v. *Secretary of Labor*,[5] rendered during pendency of the appeal, requires us to sustain the Secretary's position.

In relevant part, Section 212(a)(14) calls for exclusion from the United States of aliens seeking to perform skilled or unskilled labor unless the Secretary determines and certifies that two circumstances coexist.[6] The first

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[1] See note 27 *infra*.

[2] Act of June 27, 1952, ch. 477, tit. II, ch. 2, § 212(a)(14), 66 Stat. 182, as amended, 8 U.S.C. § 1182(a)(14) (1970).

[3] *Acupuncture Center* v. *Brennan*, 364 F.Supp. 1038 (D.D.C. 1973).

[4] Since, as we later point out, text *infra* at note 70, judicial review of the Secretary's action under § 212(a)(14) must be conducted on the basis of the administrative record, the factual material we utilize is drawn exclusively from that record, which hereinafter is cited "A.R."

[5] 163 U.S.App.D.C. 197, 501 F.2d 757, *cert. denied*, 419 U.S. 1038, 95 S.Ct. 525, 42 L.Ed.2d 315 (1974).

[6] Section 212(a)(14) provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this [Act], the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

8 U.S.C. § 1182(a)(14) (1970).

is that "there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor." [7] The second is that "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed." [8] In the case at bar, the Secretary refused a certification and the District Court, holding that the Secretary abused his discretion, returned the case to him for additional proceedings.[9]

Our review has encompassed careful analysis of the challenged decisions, administrative and judicial, as well as their common background. This opinion examines the application for certification,[10] the Secretary's determinations [11] and the District Court's disposition.[12] It then identifies the governing legal principles.[13] It concludes

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[7] See note 6 *supra*.

[8] See note 6 *supra*.

[9] *Acupuncture Center* v. *Brennan*, *supra* note 3.

[10] Part I *infra*.

[11] Part II *infra*.

[12] Part III *infra*.

[13] Part IV *infra*.

with an application of those principles to the Secretary's adjudications and an exposition of the reasoning compelling us to differ with the District Court.[14]

I. The Application

Ms. Kao, an alien, was admitted to the United States in January, 1970, as a nonimmigrant student.[15] She attended college in Kansas until May, 1972,[16] and worked as a Chinese-English interpreter in New York from July to December of that year,[17] when she assumed here present employment at Acupuncture Center of Washington. Shortly thereafter, the Center submitted an application for an alien employment certification [18] to the Department of Labor.[19] In addition to a summary of Ms. Kao's qualifications,[20] including varying degrees of fluency in English and Chinese dialects,[21] the application set forth the

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[14] Part V *infra*.

[15] Born in China, and a citizen of the Republic of China, Ms. Kao later worker as bookkeeper and Chinese-English interpreter in Taichung, Taiwan, where she also attended Providence College. There she pursued a major course of study in English literature and history, and earned the bachelor of arts degree in 1967. Following graduation she was chosen as an assistant of the College, leaving in 1970 for higher education in the United States.

[16] Fort Hays Kansas State College, from which she received the master of arts degree in business administration.

[17] He employer there was Acupuncture Center of New York, where apparently she gained some familiarity with acupuncture terminology and practice.

[18] A.R. 15-16, 20-21.

[19] See note 27 *infra*. The Center also submitted a similar application for another alien employee, which the Secretary likewise denied. That action is not before us on this appeal.

[20] A.R. 20-21.

[21] The statement was "Read, write & speak English, Mandarin, Taiwanese, Cantonese (Read, write, understand) . . . ."

Center's offer of a job as senior interpreter, bookkeeper and administrator.[22] The employee's duties were described thusly:

> Employer amploys [*sic*] numerous Chinese practitioners of Acupuncture who speak various dialects of Chinese and little English. These practitioners are supervised by one or more licensed M.D.'s. Alien applicant will be required to intelligently perform various administrative tasks for the Chinese practitioners, who communicate in Chinese. In addition, alien applicant will act as interpretor [*sic*] between American patients and Chinese practitioners.
>
> Alien will also be responsible for all bookkeeping.[23]

The application specified as minimum job requirements a high school diploma, four years of collegiate study, a bachelor of arts degree as an English major, a degree in accounting or equivalent experience, and two years' experience as a bilingual secretary.[24] As special requirements, the job offer stated that the employee "[m]ust be intelligent, personable and able to communicate in English and various dialects of Chinese." [25] As readily seen, these prerequisites matched Ms. Kao's credentials.[26]

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[22] A.R. 15-16.

[23] A.R. 16.

[24] A.R. 16.

[25] A.R. 16.

[26] As the Secretary was later to observe, "[t]he original job requirements and the alien's qualifications as listed . . . are identical." A.R. 2.

II. The Secretary's Decisions

As thus formulated, the application was disapproved by the Secretary[27] "because resident workers were available to perform the required job duties"[28] and "because the job requirements were too restrictive."[29] By separate letters from the Center[30] and its counsel,[31] reconsideration of that disposition was requesed. Counsel's letter recited that Ms. Kao spoke "many Chinese dialects,"[32] "act[ed] in a laision [*sic*] capacity between Chinese and American Doctors and patients"[33] and "translate[d] medical terminology which is vital to the functioning of the center."[34] The Center's letter declared that Ms. Kao

> function[s] as interpreter[], speaking fluent Chinese English, Mandarin, Cantonese and Shanghai dialects.[35] Many applicants for [the] position[] were

[27] The Secretary has delegated the powers conferred, and assigned the duties imposed, by § 212(a)(14) to personnel within the Manpower Administration of the Department of Labor. With exceptions not relevant here, an application for alien certification is initially passed on by a certifying officer in the geographical area wherein the employment is to occur. 29 C.F.R. § 60.4(a) (1975). A denial of certification by the certifying officer is subject to review by the Regional Director for that area or his designated representative, whose determination is final. *Id.* § 60.4(c).

[28] A.R. 3.

[29] A.R. 3.

[30] A.R. 6-7.

[31] A.R. 5.

[32] A.R. 5. See note 35 *infra.*

[33] A.R. 5.

[34] A.R. 5.

[35] A.R. 6. We are unable to fully reconcile this representation with Ms. Kao's own statement which, as we understand it, does not claim *speech* fluency in all three Chinese dialetes, and does not mention Shanghai at all. See note 21 *supra.*

> interviewed,but failed to speak the requisite number of dialects. Not all the Doctors at the Center speak the same dialect, and therefore for accurate translation between Chinese Doctor, American Doctor and patient, such fluency is a requisite.[36]

That letter also laid claim to a "proficient understanding of Acupuncture terminology and science" by Ms. Kao[37] and, while acknowledging "that there are a number of Chinese speaking people in the Washington area who can translate into English,"[38] asserted that Ms. Kao's "broad translating abilities and intimate knowledge of Acupuncture practice and terminology provides the Center with talent which is not easily replaced."[39] The letter further stated that the Center had

> directed the placing of numerous advertisements for skilled and multi-lingual translators in many Chinese newspapers including the China Post and The Chinese Journal . . . but the responses have been very poor. Those who did answer the advertisements did not possess the diverse dialect translation abilities of [Ms. Kao], nor [her] intimate knowledge of Acupuncture terminology and practice.[40]

In addition to these communications, the administrative record reflects that the application for certification was amended to remove the job requirements earlier held to be unduly restrictive.[41]

[36] A.R. 6.

[37] A.R. 6.

[38] A.R. 6.

[39] A.R. 6.

[40] A.R. 6.

[41] A.R. 3. See text *supra* at notes 24, 25.

On reconsideration, the Secretary adhered to his original disposition.[42] While the amendment of the application had eliminated the job requirements partly responsible for the earlier decision, the Secretary advised that

> based on information available to this office, we must conclude that sufficient resident workers remain available in the Washington Metropolitan Area to perform the job duties required. While we recognize that you may prefer workers who are familiar with acupuncture terminology and practice, this does not appear to be a necessary occupational consideration and only impedes effective recruitment of an otherwise qualified local worker.[43]

So, the Secretary concluded, "[i]ssuance of certification[] under the circumstances described above would be contrary to the provisions of the immigration law."[44]

The administrative record reveals the foundations upon which the essential elements of the Secretary's decisions rested.[45] As to availability of domestic workers, the Secretary said:

> In processing the initial application, contact was made with Mr. Winston Tsai, legal counselor to the D. C. Chinese Cultural Association and the Formosan Club of America, Incorporated. Mr. Tsai indicated a total membership in both organizations of 600 U.S. Citizens who are native Chinese. Many of the members are students or unemployed businessmen who

[42] A.R. 3-4.

[43] A.R. 3.

[44] A.R. 3.

[45] This appears from a memorandum, later prepared by the author of the Secretary's decision, to the Assistant Solicitor of Labor for Manpower. A.R. 1-2.

> would be available for full-time employment as Chinese interpreters. Mr. Tsai indicated that in excess of 15 of those available possessed knowledge of English and various Chinese dialects. . . .[46]

Recent availability contacts reveal that there are qualified Chinese interpreters available in the local area who generally possess knowledge of one or two different dialects. D. C. Manpower Administration files show four Chinese interpreters one of whom is fluent in both the Mandarin and Cantonese dialects. The remaining three do not specify the dialects spoken, and attempts to contact these applicants for further information have been unproductive. The Language Services Division of the Department of State (Mr. Fukuda) can refer two applicants with fluency in Mandarin Chinese but feels it would be difficult to locate interpreters with fluency in three dialects. Winston Tsai has advised that he has two applicants available for immediate referral, one of whom possesses fluency in Mandarin, Cantonese and Shanghai dialects the combination specifically required by the employer. The second applicant is fluent in Mandarin, Shanghai and Taiwanese. Mr. Tsai has indicated that he will forward a letter advising of the availability of these two applicants.[47]

The Secretary added:

> In addition, the clientele to be served by such an establishment in this community obviously must be primarily English speaking. Consequently, the Chinese language requirements are apparently identified as a necessary requirement to communicate with the practitioners. Assuming that the practitioners com-

[46] A.R. 1.

[47] A.R. 2.

municate with each other in one or two common dialects, it is difficult to understand the requirement for numerous Chinese dialects as a necessity. The letter of reconsideration did not sufficiently address this situation to the satisfaction of the Department of Labor for certification of an alien worker.[48]

And, the Secretary continued, "[t]he requirement of familiarity with acupuncture terminology and techniques, which was added by the employer in his review request, was regarded as overly restrictive, since the acquisition of specific technical jargon is a normal part of on-the-job training received on any job."[49] Soon after denial of reconsideration, appellants instituted the litigation now before us on appeal.[50]

III. The District Court's Decision

The District Court heard the case on cross-motions for summary judgment.[51] Reviewing the Secretary's decision

[48] A.R. 2.

[49] A.R. 2.

[50] While this appeal was pending, the District of Columbia adopted a regulation containing a provision undertaking to limit the practice of acupuncture to licensed physicians and dentists for a period of one year during which criteria for licensure of other acupuncturists would be formulated. This development prompted us to inquire of counsel as to whether the regulation generated any probability of early mootness, see text *supra* at note 23, and the parties submitted supplemental memoranda addressing that question. The prohibitory provision of the regulation never went into operation, however. It was promptly attacked in court, its enforcement was restrained *pendente lite*, and ultimately it was declared invalid and its operation was permanently enjoined. *Wensel* v. *Washington*, 103 Wash. L. Rep. 881 (D.C. Sup.Ct. 1975) No appeal from that decision was taken. It is clear, then, that the controversy now before us remains alive.

[51] *Acupuncture Center* v. *Brennan, supra* note 3.

primarily on the administrative record,[52] and limiting its inquiry to whether administrative discretion had been abused,[53] the court answered that question in the affirmative.[54] The court found merit in appellee's contention that "the Secretary failed to make a reasonable and complete determination that sufficient resident workers were able, willing. qualified, and available to perform the labor required by the employer":[55]

> Not only was it clear from the facts gathered that there were very few resident workers who had a sufficient knowledge of three Chinese dialects but, in addition, it is evident that the contact with Mr. Winston Tsai[56] of the Chinese Cultural Association produced only speculation as to whether there were resident workers who, in fact, were "able, willing, qualified and available. . . . There is nothing to show the workers to whom Mr. Tsai referred were willing and able to work for the Acupuncture Center nor was there any indication at all that any of these applicants had a familiarity of acupuncture terminology and science or spoke three Chinese dialects.[57]

The court disagreed with the Secretary's argument "that a knowledge of acupuncture medical terminology is not necessary for this position since it can be learned as part of the on-the-job training":[58]

> It is clear to this Court that in the sensitive setting of medical practice and all the concomitant problems that

[52] See note 70 *infra* and accompanying text.

[53] *Acupuncture Center* v. *Brennan, supra* note 3, 364 F.Supp. at 1039, 1041, 1042.

[54] *Id.* at 1042.

[55] *Id.* at 1041.

[56] See text *supra* at notes 46-47.

[57] *Acupuncture Center* v. *Brennan, supra* note 3, 364 F.Supp. at 1041 (footnote omitted).

[58] *Id.* at 1041-1042 (footnote omitted).

> arise in the course of treatment of the elderly and disabled persons seeking such treatment, it is not unreasonable for an employer to not only desire, but also require, that its employee have familiarity with the terminology. Therefore, in not considering this factor as to whether there were "able, willing, *qualified,* and available" applicants, the Secretary abused his discretion. . . .[59]

The court also rejected the Secretary's opposition to appellees' three-Chinese-dialects job requirement[60] as "equally unreasonable":[61]

> The Acupuncture Center's desire to employ an interpreter who is fluent in all three dialects is certainly understandable in light of the need of the acupuncturist for clear and immediate interpretation of the patient's ailments without having to search for one interpreter who may speak his dialect. Every employer is entitled to hire persons who have qualifications that can be utilized in a manner that will contribute to the efficiency and quality of the business. In this regard, three Chinese dialects is not an unreasonable job requisite for an interpreter in an organization that is centered on the skills of five Chinese acupuncturists who have limited or no fluency in English.[62]

Lastly, the court felt that refusal of the labor certification on the facts presented "clearly does not further the 'primary purpose of the labor certification procedure . . .

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[59] *Id.* at 1042 (emphasis by the court).

[60] See text *supra* at notes 35-36.

[61] *Acupuncture Center* v. *Brennan, supra* note 3, 364 F.Supp. at 1042.

[62] *Id.*

to protect the American labor market and to prevent depression of wages and working conditions' ":[63]

> [T]he record shows, that the plaintiff Acupuncture Center made reasonable attempts through newspaper advertising and other means to find resident workers for this position. Therefore, since there was no sufficient foundation for the Secretary to find that there were resident workers "able, willing, qualified and available," to meet the job requirements found reasonable by the Court, it can only be concluded that defendants in this case did abuse their discretion.[64]

IV. The Governing Principles

In *Pesikoff* v. *Secretary of Labor,*[65] we were called upon to determine the nature of the Secretary's obligations under Section 212(a)(14) and the scope of judicial review of their performance.[66] Analysis of the statutory language and history led us to conclude that it "set up a presumption that aliens should not be permitted to enter the United States for the purpose of performing labor because of the

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[63] *Id., quoting Ozbirman* v. *Regional Manpower Adm'r,* 335 F. Supp. 467, 471 (S.D. N.Y. 1971).

[64] *Acupuncture Center* v. *Brennan, supra* note 3, 364 F.Supp. at 1042 (footnote omitted).

[65] *Supra* note 5.

[66] We held in *Pesikoff* that the prospective employer of an alien for whom § 212(a)(14) certification is sought has standing to challenge a denial of certification. 163 U.S.App.D.C. at 199-201, 501, F.2d at 759-761. Because the employer and the alien had jointly sought judicial review, we deemed it unnecessary to consider whether the alien, who there was outside the United States, might have presented the challenge himself. *Id.* at 199, 501 F.2d at 759. Since Acupuncture Center and Ms. Kao joined in the District Court action and in this appeal, we take the same course here, leaving for possible future consideration the question whether an alien residing in this country has standing to litigate the denial alone. See *Warth* v. *Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

likely harmful impact of their admission on American workers."[67] That presumption, we said, "the statutory language makes clear," and "can be overcome only if the Secretary of Labor has determined that the two conditions set forth" therein are satisfied.[68] We emphasize our view

> that the Secretary is not obligated to prove in the case of every alien seeking entry to perform labor that the conditions are not met. Given the presumption of the statute against admission., if the Secretary's consultation of the general labor market data readily available to him suggests that there is a pool of potential workers available to perform the job which the alien seeks. the burden should be placed on the alien or his putative employer to prove that it is not possible for the employer to find a qualified American worker.[69]

Judicial review of the Secretary's decision is confined to examination of the administrative record,[70] and "[i]n order to reverse the Secretary's denial of certification,"

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[67] 163 U.S.App.D.C. at 201, 501 F.2d at 761.

[68] *Id.*

[69] *Id.*

[70] *Camp* v. *Pitts*, 411 U.S. 138, 142-143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111-112 (1973); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88, 63 S.Ct. 454, 459, 87 L.Ed. 626, 633 (1943); *Chang Wing Cheung* v. *Hamilton*, 198 F.Supp. 154, 156 (D.R.I. 1961), *aff'd*, 298 F.2d 459 (1st Cir. 1962). *Cf. Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825-826, 28 L.Ed.2d 136, 155 (1971). During the course of oral argument in the District Court, the judge asked various questions of counsel for Acupuncture Center in an effort to familiarize himself with the Center's operations, and the information sought was later provided in an affidavit submitted by the Center. In light of the Secretary's timely objection, this affidavit should not have been accepted or considered by the District Court. Accordingly, the factual assertions contained therein have been given no weight on appeal.

we added, it must be found "that the denial was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[71]

As we have already mentioned, our *Pesikoff* decision was announced while the instant case was on appeal in this court. Consequently, the District Court not only lacked the guidance that *Pesikoff* would have afforded, but also faced holdings outside this circuit that the statute assigned to the Secretary some burden of proof at the administrative level.[72] The difference between the District Court's result and our own is primarily attributable to the circumstances that it followed a construction of the governing statute which in *Pesikoff* we declined to adopt.[73]

V. Application of the Principles

While the District Court correctly identified abuse of discretion as the *sine qua non* for judicial intervention,[74] the pervasive theme of its decision was that the Secretary was required 'to make a . . . complete determination that sufficient resident workers were able, willing, qualified, and

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[71] *Pesikoff* v. *Secretary of Labor*, *supra* note 5, 163 U.S.App. D.C. at 201 n.5, 501 F.2d at 761 n.5, quoting Administrative Procedure Act § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1970). See also *Citizens to Preserve Overton Park* v. *Volpe*, *supra* note 70, 401 U.S. at 416, 91 S.Ct. at 823, 28 L.Ed.2d at 153; *Secretary of Labor* v. *Farino*, 490 F.2d 885, 889-890 (7th Cir. 1973); *Song Jook Suh* v. *Rosenberg*, 437 F.2d 1098, 1102 (9th Cir. 1971).

[72] See cases cited in *Pesikoff* v. *Secretary of Labor*, *supra* note 5, 163 U.S.App.D.C. at 202 n.9, 501 F.2d at 762 n.9.

[73] On the core issue of burden of proof, the District Court cited and quoted approvingly from *Golabek* v. *Regional Manpower Adm'r*, 329 F.Supp. 892 (E.D. Pa. 1971), a decision we expressly rejected in *Pesikoff*, 163 U.S.App.D.C. at 202 n.9, 501 F.2d at 762 n.9.

[74] *Acupuncture Center* v. *Brennan*, *supra* note 3, 364 F.Supp. at 1039, 1041, 1042.

available to perform the labor required by the employer.'' [75] To be sure, the administrative record does not fully demonstrate that a domestic worker (a) fluent in English and each of the three specified Chinese dialects, and also (b) familiar with acupuncture terminology and practice, (c) was available and (d) was able and willing to accept employment by the Center; but *Pesikoff* holds that the foundation for the Secretary's decision need not be nearly so broad.

Section 212(a)(14), as we have said, establishes a presumption against admission of aliens for the purpose of performing labor.[76] The presumption is triggered by the Secretary's consultation with general labor market data sugesting the availability of workers to perform the job which the alien seeks.[77] The burden is then cast on the alien or his would-be employer to show that no qualified domestic worker can be found.[78] A court may overturn the Secretary's determination only if it can be said that he abused his discretion in concluding as he did.[79] We think the administrative record, examined in that light, insulates the Secretary from a finding that his refusal of the labor certification here sought was the product of misguided discretion.

The Secretary was informed that a number of qualified Chinese interpreters generally proficient in one or two Chinese dialects were locally available.[80] Among them was an individual, available for immediate referral, who was fluent in each of the three dialects which the Center had

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[75] *Id.* at 1041.

[76] See text *supra* at notes 66-69.

[77] See text *supra* at note 69.

[78] See text *supra* at note 69.

[79] See text *supra* at note 71.

[80] See text *supra* at notes 46-47.

specified.[81] At least two others—one of whom was known to be also available—were fluent in two of the three dialects.[82] The size of the pool fairly indicated that there could well have been more.[83]

To these considerations must be added the Secretary's reservation as to whether, as a threshold matter, a three-dialect facility was essential to the function which the job-holder was supposed to perform. Accepting the Center's explanation as an expression of need for an interpreter to enable communication between Americans and Chinese, [84] and assuming that the Chinese practitioners communicated among themselves in one or more common dialects,[85] the Secretary found it ''difficult to understand the requirement for numerous Chinese dialects as a necessity.'' [86] The Secretary ultimately discarded the requirement because ''[t]he letter of reconsideration did not sufficiently address the situation to the satisfaction of the Department of Labor for certification of an alien worker''; [87] in other words, that the burden of proof in that regard had not been carried. The further requirement of familiarity with acupuncture terminology and technique met a similar fate as too restrictive because, in the Secretary's view, ''the acquisition of specific technical jargon is a normal part of on-the-job training received on any job.'' [88]

We cannot say that the Secretary's course of reasoning was irrational. Nor can we characterize the Secretary's

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[81] See text *supra* at note 47.

[82] See text *supra* at note 47.

[83] See text *supra* at notes 46-47.

[84] See text *supra* at notes 33-36.

[85] See text *supra* at note 36.

[86] See text *supra* at note 48.

[87] See text *supra* at note 48.

[88] See text *supra* at note 49.

demurrer to the application for certification as baseless or arbitrary. The information furnished the Secretary suggests the potential for satisfying the Center's need, even as portrayed by the Center, from the domestic labor market.[89] Beyond that, the data before the Secretary indicated convincingly that the market was fully capable of supplying the need—for an interpreter fluent in less than three Chinese dialects—[90] that the Secretary deemed satisfactorily demonstrated, and we perceive no ground for overruling the Secretary on that score. As we said in *Pesikoff*, "[i]f the Secretary were required to find an individual American worker who met all the personal specifications of the prospective employer of each alien seeking Section 212(a)(14) certification, the burden on him in performing his statutory duty to protect the American labor market would be much greater than Congress intended. . . ."[91] We held that, rather "[i]t is well within the Secretary's discretion to ignore employer specifications which he deems, in accordance with his labor market expertise, to be irrelevant to the basic job which the employer desires performed."[92] His task, we declared, is simply to locate "a class of workers who, while possibly not meeting the prospective employer's personalized job description, do provide the employer with the potential for getting his job accomplished."[93] We think the administrative record is more than ample to establish that he did that.

No more was required, then, to activate the presumption imposing upon the proponents of certification the burden of proving "that it is not possible for the employer to find a

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[89] See text *supra* at note 47.

[90] See text *supra* at notes 48-49.

[91] *Pesikoff* v. *Secretary of Labor*, *supra* note 5, 163 U.S.App.D.C. at 202, 501 F.2d at 762.

[92] *Id.* (footnote omitted).

[93] *Id.* at 203, 501 F.2d at 763.

qualified American worker."[94] Nor can we upset the Secretary's implicit conclusion that that was not done. We are mindful, of course, that the Center informed the Secretary that it had been unsuccessful in efforts to locate a suitable domestic interpreter,[95] but in our view that hardly suffices to carry the day. There is nothing to indicate that the Center consulted the sources upon which the Secretary drew,[96] and there is more than enough to suggest that the Center's quest was invariably limited by insistence upon the three-dialect requirement.[97] We are unable, on an abuse-of-discretion basis, to accept this showing as a discharge of the burden of proof sufficient to override the Secretary's determination, under the circumstances, that a certification of unavailability was not warranted.[98]

The judgment appealed from is reversed, and the case is remanded to the District Court for entry of summary judgment in favor of the Secretary.

So ordered.

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[94] *Id.* at 201, 501 F.2d at 761.

[95] See text *supra* at note 40.

[96] "We think it clear that Congress did not intend Section 212(a)(14) to create an employment placement office in the Department of Labor. . . ." *Pesikoff* v. *Secretary of Labor*, *supra* note 5, 163 U.S.App.D.C. at 204, 501 F.2d at 764.

[97] See text *supra* at notes 32-40.

[98] Compare *Pesikoff* v. *Secretary of Labor*, *supra* note 5, 163 U.S. App.D.C. at 204, 501 F.2d at 764.

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Oct. 5, 1973.

Civ. A. No. 635-73.

ACUPUNCTURE CENTER OF WASHINGTON and YANN THERESA KAO, *Plaintiffs,*

v.

PETER J. BRENNAN, Secretary of Labor, and LORENZO M. WHITE, Acting Director, Office of Employment Services, *Defendants.*

* * * * * * * * * *

Howard Esterces, New York City, admitted pro hac vice, for plaintiffs.

Richard I. Chaifetz, Atty., Dept. of Justice, Washington, D. C., for defendants.

Memorandum

GASCH, *District Judge.*

This matter is before the Court on cross-motions for summary judgment. The dispositive issue which must be decided is whether the Secretary of Labor, acting through the Regional Manpower Administrator, abused his discretion in denying a labor certification to the plaintiff who is an alien. The Court funds that the defendants did indeed abuse their discretion.

Plaintiff, Yann Theresa Kao, [1] a national of the Republic of China, was born in mainland China in 1941 and after completing her undergraduate studies at Providence Col-

[1] In addition to Ms. Kao, the Acupuncture Center of Washington, Ms. Kao's present employer and a prime movant in seeking certification for its employee, is also a plaintiff in the action.

lege in Taichung, Taiwan, entered the United States as a non-immigrant student on January 1, 1970.[2] Two years later, in May of 1972, Ms. Kao received her Master of Science Degree in Business Administration from Fort Hayes Kansas State College, Hayes, Kansas. During the course of her studies the plaintiff became fluent in three Chinese dialects, Cantonese, Mandarin, and Shanghai, and is proficient in the translation of these dialects from English to Chinese and Chinese to English.

After receiving her degree from Fort Hayes Kansas State College, Ms. Kao began work as an interpreter for the Acupuncture Center now located in Washington,[3] D. C. The Acupuncture Center employs five Chinese acupuncturists under the supervision of four American medical doctors. To assist these Chinese acupuncturists in what is a comparatively new technique of medical treatment in this country, the Center has on its staff approximately fifteen Chinese females, of which Ms. Kao was one.[4] The duties of these interpreters include the translation from English to Chinese or Chinese to English between the acupuncturist and his patient during the course of treatment, thus aiding in the identification of the ailment of the patient and communication of these medical problems between patient and acupuncturist. Such communication necessarily includes the use of medical terminology of which Ms. Kao

[2] Ms. Kao received her B.A. Degree from Providence College in 1967 where she studied bookkeeping, English literature and history, and aided in the translation of Chinese into English or English into Chinese. Letter of Sister Agnes Joan of Providence College. January 10, 1973, Administrative Record at 17.

[3] Between July, 1972, and December, 1972, Ms. Kao worked in the Acupuncture Clinic of New York as an interpreter after which she became an employee of the Acupuncture Center of Washington.

[4] Affidavit of Mr. Charles Newmark, Administrative Director of the Acupuncture Center of Washington at 1.

has considerable knowledge due to her tenure as an interpreter.[5]

On January 22, 1973, the Acupuncture Center filed a labor certification with the Department of Labor.[6] The job description required a person capable of interpreting from various dialects of Chinese into English and a person capable of performing all of its bookkeeping. The Certifying Officer found that the "available job market information will not warrant a certification of unavailability of workers in the United States" and further ruled that the job requirements were too restrictive.[7] In response to this denial, the Acupuncture Center requested reconsideration and deleted the requirement of bookkeeping skills while

[5] It is significant that the five Chinese acupuncturists have "limited or no fluency in English," thus increasing the importance of a competent translator in this medical setting. Affidavit of Charles Newmark at 2.

[6] A labor certification is required of all aliens who desire to enter or permanently remain in the United States for the purpose of employment pursuant to 8 U.S.C. § 1182(a)(14). This section provides in part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) There are not sufficient workers in the United States who are *able, willing, qualified, and available* at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . . . (Emphasis added).

[7] Finding of Flora Richardson, Certifying Officer, Administrative Record at 13.

noting the importance of Ms. Kao's understanding of acupuncture terminology and science.[8]

Plaintiffs' request for reconsideration was rejected by Lorenzo White, Acting Director of Employment Services of the District of Columbia Manpower Administration. Mr. White stated that the amendment of the application had removed the factors creating the adverse effect as a basis for denial, but he went on to indicate that

> . . . we must conclude that sufficient resident workers remain available in the Washington Metropolitan Area to perform the job duties required. While we recognize that you may prefer workers who are familiar with acupuncture terminology and practice, this does not appear to be a necessary occupational consideration and only impedes effective recruitment of an otherwise qualified local worker.[9]

The underlying basis for Mr. White's conclusion that "sufficient resident workers remain available" is revealed in a letter from Mr. White to Robert Pfeffer, Assistant Solicitor of Labor for Manpower, in which Mr. White notes that in processing the initial application, contact was made with Mr. Winston Tsai, legal counselor to the D.C. Chinese Cultural Association and the Formosan Club of America, Incorporated. Mr. Tsai informed defendants that to his knowledge there were in excess of 15 persons in the area who "possessed knowledge of English and various Chinese dialects."[10] Furthermore, Mr. Tsai indicated two applicants were available for immediate referral, one of whom

[8] Letter of counsel for plaintiff to Lorenzo White, Director of Employer and Technical Services, D. C. Manpower Administration, February 21, 1971, Administrative Record at 6.

[9] Letter of Lorenzo White, March 8, 1973, to Stephen M. Warner, Administrative Record at 3.

[10] Letter of Lorenzo White to Robert Pfeffer, March 20, 1973, Administrative Record at 1.

spoke the three Chinese dialects described as a job requisite by the Acupuncture Center.[11] Mr. Tsai indicated that he would forward a letter advising of the availability of these two applicants. Plaintiff at oral argument indicated no such referral was made.

An additional contact with Mr. Fukuda of the Language Services Division of the Department of State revealed that Mr. Fukuda could refer two applicants with a fluency in Mandarin Chinese but Mr. Fukuda felt "it would be difficult to locate interpreters with fluency in three dialects." [12]

Within this factual setting, the question is now presented to the Court whether the Secretary abused his discretion in denying a labor certification to plaintiffs.[13] The plaintiffs argue that under 8 U.S.C. § 1182(a)(14)[14] the Secretary failed to make a reasonable and complete determination that sufficient resident workers are able, willing, qualified, and available to perform the labor required by the employer. After a careful review of the administrative record before the Court, it is clear that plaintiffs' argument has much merit. Not only was it clear from the facts gathered that there were very few resident workers who had a sufficient knowledge of three Chinese dialects [15] but,

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[11] *Id.* at 2.

[12] *Id.*

[13] The courts have almost uniformly limited their review in similar cases involving the classification of aliens to a deitermination whether upon review of the administrative record, there has been an abuse of discretion. Song Jook Suh v. Rosenberg, 437 F. 2d 1098, 1102 (9th Cir. 1971); Asuncion v. District Director, 427 F.2d 523 (9th Cir. 1970). *See also* Golabek v. Regional Manpower Adm'n, United States Dept. of Labor, 329 F.Supp. 892 (E.D.Pa. 1971); Yau v. District Director of United States Immigration and Naturalization Service, 293 F.Supp. 717 (C.D.Cal.1968).

[14] See note 5.

[15] As noted previously, Mr. Fukuda of the State Department indicated it would be difficult to locate interpreters with a fluency in three dialects.

in addition, it is evident that the contact with Mr. Winston Tsai of the Chinese Cultural Association produced only speculation as to whether there were resident workers who, in fact, were "able, willing, qualified and available."

A similar situation was presented in the case of Golabek v. Regional Manpower Administration, United States Department of Labor, 329 F.Supp. 892 (E.D.Pa. 1971). In *Golabek* a labor certification was denied to plaintiff on the grounds, *inter alia*, that there were qualified resident applicants seeking employment in this same field of art education. The Court noted that

> Although the Administrator's investigation revealed that qualified job applicants were available, there is nothing to indicate that anyone other than petitioner, was interested in the Archdiocesan vacancy .... There are no facts present on the record which indicate to us that petitioner is likely to displace any American worker. In addition, although the Administrator found that there might be qualified and available applicants, there is nothing to indicate that those applicants would be 'able and willing' to work for the Archdiocese.

329 F.Supp. at 895.

This Court is met with an equal, if not more egregious, lack of facts in the record to support the Secretary's finding. There is nothing to show the workers to whom Mr. Tsai referred were willing and able to work for the Acupuncture Center nor was there any indication at all that any of these applicants had a familiarity of acupuncture terminology and science or spoke three Chinese dialects.

The government argues that a knowledge of acupuncture medical terminology is not necessary for this position since it can be learned as part of the on-the-job training.[16] It is

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[16] Letter from Lorenzo White to Robert Pfeffer, April 20, 1973, Administrative Record at 2.

clear to this Court that in the sensitive setting of medical practice and all the concomitant problems that arise in the course of treatment of the elderly and disabled persons seeking such treatment, it is not unreasonable for an employer to not only desire, but also require, that its employee have familiarity with the terminology. Therefore, in not considering this factor as to whether there were "able, willing, *qualified,* and available" applicants, the Secretary abused his discretion (emphasis added).

Similarly, the government's objection to the three Chinese dialects requirement for the position is equally unreasonable. This objection was articulated by Mr. Lorenzo White, the Reviewing Officer:

> In addition, the clientele to be served by such an establishment in this community must be primarily English speaking. Consequently, the Chinese language requirements are apparently identified as a necessary requirement to communicate with the practitioners. Assuming that the practitioners communicate with each other in one or two common dialects, it is difficult to understand the requirement for numerous Chinese dialects as a necessity. The letter of reconsideration did not sufficienty address this situation to the satisfaction of the Department of Labor for certification of an alien worker.[17]

Mr. White's objection does not appear to this Court to be well taken. The Acupuncture Center's desire to employ an interpreter who is fluent in all three dialects is certainly understandable in light of the need of the acupuncturist for clear and immediate interpretation of the patients' ailments without having to search for one interpreter who may speak his dialect. Every employer is entitled to hire persons who have qualifications that can be utilized in a manner that will contribute to the efficiency and quality of

[17] *Id.*

the business. In this regard, three Chinese dialects is not an unreasonable job requisite for an interpreter in an organization that is centered on the skills of five Chinese acupuncturists who have limited or no fluency in English.

The denial of a labor certification on the facts presented to this Court clearly does not further the "primary purpose of the labor certification procedure . . . to protect the American labor market and to prevent depression of wages and working conditions." Ozbirman v. Regional Manpower Administrator, United States Department of Labor, 335 F.Supp. 467, 471 (S.D.N.Y. 1971).[18] Plaintiff has maintained, and the record shows,[19] that the plaintiff Acupuncture Center made reasonable attempts through newspaper advertising and other means to find resident workers for this position. Therefore, since there was no sufficient factual foundation for the Secretary to find that there were resident workers "able, willing, qualified and available," to meet the job requirements found reasonable by the Court, it can only be concluded that defendants in this case did abuse their discretion.

Pursuant to the facts and conclusions cited herein, this case is remanded to the Secretary of Labor for further proceedings not inconsistent with this Memorandum.

[18] *See* Digilab, Inc. v. Secretary of Labor, 357 F.Supp. 941 (D. Mass., 1973). In *Digilab*, the U. S. District in Massachusetts, per Judge Frank Freedman, wrote concerning the "able, willing" requirement:

> The record does not reveal that the Manpower Administration made a determination that there were those who were willing and able to accept a job with Digilab. The fact that the National Registry for Engineers lists only two hundred possible qualified engineers in the entire country available for the job in question does not in this court's eyes establish a necessary record of sufficient workers in the United States who are "qualified,' 'available,' 'able,' and 'willing.'

[19] Administrative Record at 9.

Supreme Court, U. S.
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No. 75-1497

In the Supreme Court of the United States

OCTOBER TERM, 1975

ACUPUNCTURE CENTER OF WASHINGTON, ET AL.,
PETITIONERS

v.

WILLIAM J. USERY, JR., SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not yet reported. The opinion of the district court (Pet. App. 20a-27a) is reported at 364 F. Supp. 1038.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1976. The petition for a writ of certiorari was filed on April 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Secretary of Labor properly denied an alien's application for labor certification under Section 212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182 (a)(14).

STATEMENT

1. Petitioner Yann Theresa Kao was admitted to the United States from Taiwan as a non-immigrant student in January 1970 (Pet. App. 20a-21a). After her graduation from Fort Hayes Kansas State College in May 1972 with a degree in Business Administration, petitioner Kao began working—contrary to the conditions of her student visa—as a Chinese-English interpreter for petitioner Acupuncture Center (Pet. App. 21a). In December 1972, petitioner Kao accompanied the Acupuncture Center when it moved from New York to Washington, D.C. (Pet. App. 21a, n. 3; App. 30).[1]

On January 22, 1973, petitioner Kao applied to the Secretary of Labor for the issuance of a labor certification under Section 212(a)(14) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. 1182(a)(14). This request for certification, which was necessary in order for petitioner Kao to obtain preferential immigrant status[2]

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[1]"App." refers to the appendix to the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[2]Before an alien in the position of petitioner Kao may obtain preferential immigrant status for the purpose of employment, the Secretary of Labor must certify to the Secretary of State and the Attorney General, pursuant to Section 212(a)(14), that (A) "there are not sufficient workers in the United States who are able, willing, qualified, and available" for the job that the alien has been offered, and (B) the alien's employment "will not adversely affect the wages and working conditions" of similar workers in the United States.

The Secretary of Labor has delegated his power to issue labor certifications to the Office of the Manpower Administration for the area in which the employment is to occur. 29 C.F.R. 60.4(a). For aliens in the circumstances of petitioner, application must first be made to the State Employment Service, which evaluates the market for people qualified to fill the job in question; the State Employment Service forwards its report and information to the Office of Manpower Administration. 29 C.F.R. 60.3(c).

as a combination accountant, administrator, and interpreter of three Chinese dialects (App. 44-45), was supported by a "Job Offer for Alien Employment" form submitted by her employer, petitioner Acupuncture Center (App. 39). The job offer showed a need for a person with a college degree in accounting, two years of experience as a bilingual secretary, and an ability "to communicate in English and various dialects of Chinese" (App. 40).

The Manpower Administration certifying officer denied petitioner Kao's application on February 15, 1973, finding that the "available job market information will not warrant a certification of unavailability of workers in the United States" and that the job requirements listed by petitioner Acupuncture Center were unnecessarily restrictive (Pet. App. 22a). Petitioner Acupuncture Center requested reconsideration of the denial, offering to delete the requirement of accounting and bookkeeping skills and noting that it had unsuccessfully placed several advertisements in Chinese newspapers (Pet. App. 7a; App. 21). Petitioner further noted that it had turned down other job applicants who were not fluent in "Chinese, English, Mandarin, Cantonese and Shanghai dialects" or who did not possess an intimate knowledge of acupuncture terminology and practice (App. 29).

On March 8, 1973, the certifying officer's denial of certification was affirmed by the Acting Director of the Office of Employment Services of the District of Columbia Manpower Administration, who concluded that "resident workers were available to perform the required job duties" and that familiarity with acupuncture terminology and practice did not "appear to be a necessary occupational consideration and only impedes effective recruitment of an otherwise qualified local worker" (App. 26). The basis for the reviewing officer's belief that there were

resident workers available to perform the required duties was: (1) information from the legal counselor to two District of Columbia Chinese cultural associations, who indicated that many of the organizations' more than 600 members would be available for full-time employment as interpreters, that in excess of 15 of those members spoke various Chinese dialects, and that two individuals were immediately available, one of whom was fluent in Mandarin, Cantonese and Shanghai dialects (Pet. App. 8a-9a); (2) files of the D.C. Manpower Administration indicating the availability of four Chinese interpreters, including one who was fluent in both the Mandarin and Cantonese dialects (Pet. App. 9a); and (3) information from the State Department that two interpreters of Mandarin Chinese were available for employment (Pet. App. 9a). The reviewing officer also concluded that "the acquisition of specific technical [medical] jargon" was not essential in selecting applicants for petitioner Acupuncture Center's position because it was "a normal part of on-the-job training received on any job" (Pet. App. 10a).

2. On April 2, 1973, petitioners instituted this action in the United States District Court for the District of Columbia to review the decision of the Secretary of Labor not to issue a labor certification (App. 1-2). The district court ruled that the Secretary, acting through the Regional Manpower Administrator, had abused his discretion in denying the certification and remanded the case for further administrative proceedings (Pet. App. 20a-27a). Specifically, the court disagreed with the Secretary's determination that a knowledge of acupuncture medical terminology was not a necessary requirement for prospective job applicants and concluded that there had been an insufficient factual foundation laid to support a finding that there

were "able, willing, qualified, and available" resident workers.[3]

The court of appeals reversed (Pet. App. 1a-19a). Relying on its prior decision in *Pesikoff* v. *Secretary of Labor*, 501 F. 2d 757, certiorari denied, 419 U.S. 1038, which had been announced after the district court's decision, the court of appeals found that "the data before the Secretary indicated convincingly that the market was fully capable of supplying the need * * * that the Secretary deemed satisfactorily demonstrated" (Pet. App. 18a), and that the Secretary had not abused his discretion under the Act.

ARGUMENT

Petitioners do not dispute the court of appeals' statement (Pet. App. 19a, n. 96) that "Congress did not intend Section 212(a)(14) to create an employment placement office in the Department of Labor * * *." See *Pesikoff* v. *Secretary of Labor, supra*, 501 F. 2d at 764; *Digilab, Inc.* v. *Secretary of Labor*, 495 F. 2d 323, 326 (C.A. 1), certiorari denied, 419 U.S. 840. Nor do they question the court's conclusion (Pet. App.

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[3]We note that the district court may have lacked jurisdiction over this action. Petitioner's complaint (App. 2) states that jurisdiction was invoked under the Declaratory Judgment Act, 28 U.S.C. 2201, and the Administrative Procedure Act, 5 U.S.C. 701-706. But the Declaratory Judgment Act is not a grant of subject-matter jurisdiction to the courts, *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671-672, and the question whether the Administrative Procedure Act provides an independent basis for jurisdiction is presently before the Court in *Mathews* v. *Sanders*, No. 75-1443, certiorari granted, June 1, 1976. There is, however, no reason to hold this case pending the decision in *Mathews*, since petitioners were unsuccessful on the merits of the instant controversy after the courts below had erroneously proceeded as if jurisdiction had been properly alleged.

16a) that Section 212(a)(14) "establishes a presumption against admission of aliens for the purpose of performing labor." See *Pesikoff* v. *Secretary of Labor, supra,* 501 F. 2d at 761; *Seo* v. *United States Department of Labor,* 523 F. 2d 10, 13 (C.A. 9). Finally, petitioners agree (App. 5) that the decision whether to issue a labor certification is addressed to the sound discretion of the Secretary of Labor.

Petitioners' sole contention is that, in reviewing the Secretary's determination, the court of appeals applied a standard that conflicts with the approach taken in *Shuk Yee Chan* v. *Regional Manpower Administrator of the United States Department of Labor,* 521 F. 2d 592 (C.A. 7) and *Seo* v. *United States Department of Labor, supra.* Specifically, petitioners claim that the Secretary may not deny a labor certification in reliance upon information, no matter how credible, regarding the existence of a pool of potential workers who are "able, willing, qualified, and available" to fill the required position, but must actually find, even in the absence of contradictory evidence, that a specific person, acceptable to the employer, is available to do the job.[4] We submit that this contention is erroneous, that the decision of the court of appeals is not inconsistent with the holdings of other courts, and that the Secretary's essentially factual determination to withhold a labor certification from petitioner Kao does not warrant further review.

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[4]We note that the record in this case indicates that the Secretary may have met the standard petitioners propose, since he denied the labor certification in part upon information from the D.C. Chinese Cultural Association that a specific individual was actually "able, willing, qualified, and available" to satisfy petitioner Acupuncture Center's job description. See p. 4, *supra.*

Neither decision on which petitioners rely establishes that the Secretary is prohibited by Section 212(a)(14) from denying relief on the basis of reliable information showing a pool of available workers. In *Shuk Yee Chan* v. *Regional Manpower Administrator of the United States Department of Labor, supra,* for example, the court expressly concluded (521 F. 2d at 594) that the accuracy and reliability of the Illinois State Employment Service data on which the Secretary had exclusively relied was "shrouded in doubt." Furthermore, the Seventh Circuit cited with approval *Bitang* v. *Regional Manpower Administrator of the United States Department of Labor,* 351 F. Supp. 1342, 1345 (N.D. Ill.), in which the government had not disputed that the Illinois State Employment Service "accepts applicants' statements of qualification without verification, does not verify whether they are presently employed, and makes no effort to strike from the list of applicants the names of those persons who have found employment unless those persons request such action."[5] Against this background, the court of appeals was unwilling to approve "an administrative procedure which appears to have involved a perfunctory exercise of acquiescence in the statistical compilations of the state employment service" (521 F. 2d at 595).

Similarly, in *Seo* v. *United States Department of Labor, supra,* after expressly stating that it "agree[d] with the analysis of [Section 212(a)(14)] in *Pesikoff,*" the court of appeals upheld the reversal of the Secretary's denial of labor certification because he had relied solely upon an employment listing of the California Department of Human Resources Development that had been shown to be "unreliable" and had been "impeached" (523 F. 2d at 13).

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[5]The district court nevertheless noted that, despite these flaws, a group of 150 applicants would be "sufficiently substantial" to justify a denial of labor certification by the Secretary. 351 F. Supp. at 1345.

Cf. *Reddy, Inc.* v. *United States Department of Labor*, 492 F. 2d 538 (C.A. 5) and *Ratnayake* v. *Mack*, 499 F. 2d 1207 (C.A. 8) (denial of labor certification reversed where Secretary had referred to an incorrect class of workers).

Thus, *Shuk Yee Chan* and *Seo* merely reflect differing appraisals of the reliability of the state employment service data on which the Secretary's decision had been based, rather than a disagreement over the relevant statutory criteria that govern the Secretary's exercise of discretion.[6] Here, the Secretary expressly relied on a number of sources of employment information, none of which has been shown to be inappropriate or unreliable, and his reliance on those sources was reasoned rather than "a perfunctory exercise of acquiescence." The Secretary therefore did not abuse his discretion in denying relief.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Moreover, in neither *Shuk Yee Chan* nor *Seo* had the Secretary concluded that the employer's job description was unduly narrow.

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